

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of December 14)

December 15, 2020

Federal Courts Dismiss COVID-19 Business Interruption Claims

On December 11, 2020, the federal district court for the Southern District of New York granted Admiral Indemnity Company's motion to dismiss a restaurant's class action complaint for losses resulting from COVID-19 closure orders. The court found that the meaning of the phrase "direct physical loss of or damage to" in the policy "connotes a negative alteration in the tangible condition of the property" and held that the loss of ability to use otherwise unaltered or existing property "cannot be classified as a form of 'direct physical loss' or 'damage.'" Order at 11-12. The court further held that the policy's civil authority coverage was not triggered when the complaint failed to plead that the surrounding area suffered damage or that the closure order completely barred access to the insured property but, instead, limited the insured to take-out and delivery services. *Id.* at 25-26.

On December 7, 2020, the federal district court for the Eastern District of Pennsylvania granted The Dentists Insurance Company's motion to dismiss a COVID-19 business interruption claim. The court held that the policy's virus exclusion unambiguously applied to COVID-19, and barred coverage. Order at 6-8. The court then held that even if the virus exclusion did not apply, the plaintiff had failed to plead facts sufficient to establish that the policy covered its claim under the policy's dental income or civil authority coverage because the complaint did not allege that the virus was present on its premises or had made the premises unusable; rather, the plaintiff was able to stay open on a limited basis for emergency procedures. *Id.* at 9-11.

On December 7, 2020 the federal district court for the Southern District of Florida granted Certain Underwriters at Lloyd's London's motion to dismiss two restaurants' COVID-19 business interruption claims under an "all-risk" commercial property policy and dismissed the amended complaint with prejudice. The Court held that loss of use of property, with no physical damage to it, does not establish coverage under the business income or extra expense provisions. Order at 11-12. Finding the plaintiffs failed to plead any physical damage to the surrounding property or that a civil authority order restricted their access, the Court held the allegations could not establish coverage under the civil authority provision of the policy because the plaintiffs could stay open on a limited basis. *Id.* at 13.

On December 10, 2020, the federal district court for the Northern District of California granted State Farm General Insurance Company's motion to dismiss a medical clinic's COVID-19 business interruption claim. The court held that the policy's virus exclusion barred coverage, rejecting the plaintiff's argument that the exclusion does not apply because its claim was premised on "the role of human droplets as separate and distinct from virus particles." In dismissing the complaint without prejudice, the court noted that it was "skeptical that, given the nature of the dispute and the Court's legal findings, it is possible for Plaintiff to amend the complaint to address these deficiencies."

On December 7, 2020, the federal district court for the Southern District of Iowa granted Integrity Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by restaurant operators. The court concluded that the phrase "direct physical loss of or damage to property" requires "physical invasion" and that "loss of use is insufficient to trigger coverage without physical damage to the insured properties." Order at 15. Because the plaintiffs had alleged a loss of use, their complaint

failed to plead a direct physical loss. The court also found that the policy’s virus exclusion precluded coverage and rejected the plaintiffs’ argument that their losses were caused by COVID-19 closure orders rather than the coronavirus. *Id.* at 20.

On December 9, 2020, the federal district court for the Northern District of California granted Citizens Insurance Company of America’s motion for judgment on the pleadings in a COVID-19 business interruption suit filed by the operators of a San Francisco event planning business. The court concluded that the policy provided no coverage for the plaintiff’s alleged losses arising out of COVID-19 closure orders, because losses from “the temporary inability to access an unharmed property are not ‘direct physical loss of or damage to’ property.” Order at 5. The court further concluded that the policy’s virus exclusion barred coverage and that the plaintiff could not “convincingly argue that its losses were caused by the March 2020 governmental orders while ignoring that those governmental orders were themselves caused by a virus.” *Id.* at 8.

New Business Interruption Suits Against Insurers:

The owner of a hotel in Pennsylvania sued Westfield Insurance Company and American Select Insurance Company in federal court (M.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶19-24. The policy also contains an exclusion for “any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶86. The complaint alleges the defendants wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶ 82-83.

The owners of a group of hotel properties located in Delaware, New Jersey, Pennsylvania, and Virginia sued The Hartford Mutual Insurance Company in federal court (E.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 45-63. The policy also contains an exclusion for “loss or damage caused by or resulting from any virus, bacterium or other microorganism.” *Id.* at ¶116. The complaint alleges that the defendant wrongfully denied the plaintiffs’ claim for coverage. *Id.* at ¶142.

A real estate transactions holding company with operations across the country sued Zurich American Insurance Company in federal court (D.R.I.), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, civil authority, gross earnings, time element loss, ingress/egress, and protection and preservation of property coverage. Complaint at ¶¶ 10, 88-106. The complaint alleges that the defendant denied the plaintiff’s claim for coverage “without proper investigation and based on an apparent systematic company practice designed to minimize payments for covered COVID-19 claims.” *Id.* at ¶93. The policy does not contain a virus exclusion, but contains a “contamination exclusion” which the defendant asserted barred coverage. *Id.* at ¶¶117-119.

The owner of a restaurant in Austin sued Blackboard Insurance Company in Texas state court (Travis County), asserting claims for breach of contract, violation of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and declaratory relief. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶8-35. The complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage without conducting a meaningful investigation. *Id.* at ¶¶36-39.

Two modeling schools sued Sentinel Insurance Company in federal court (N.D. Cal.) for breach of contract, breach of the duty of good faith and fair dealing, and unfair business practices in violation of California Business & Professions Code § 17200 *et seq.* The “all risk” policies allegedly provide business income, extended business income, and civil authority coverage. Complaint at ¶¶ 42, 58, 61. The Complaint alleges that the presence of coronavirus “involves a physical interaction with property” and that

“[t]his damage is direct, in that the presence of SARS-CoV-2 virus particles renders property dangerous and less valuable.” *Id.* at ¶53.

A national restaurant chain sued Zurich American Insurance Company in federal court (D. Colo.) for declaratory relief, breach of contract, violation of C.R.S. §§ 10-3-1115, 1116, and bad faith. The “all risk” policy allegedly provides business interruption and extra expense coverage. Complaint at ¶¶ 57, 75 The Complaint alleges that the actual or threatened presence of coronavirus “has rendered physical property within those premises damaged, unusable, uninhabitable, unfit for intended function, dangerous, and unsafe” and that such circumstances have “caused and continue to cause and/or create the risk of direct physical loss of and damage to the covered premises and property.” *Id.* at ¶ 28. The insurer allegedly “misrepresented the scope of the Policy by, *inter alia*, stating that the Contamination exclusion applies when such exclusion is inapplicable, ambiguous and/or unenforceable.” *Id.* at ¶ 103.

A retail store sued Auto-Owners Insurance Company in Kentucky state court (Jefferson County) for declaratory relief, breach of contract, and unjust enrichment under its insurance policy. The commercial liability and property policy allegedly provides business interruption coverage. Complaint ¶ 8. The plaintiff allegedly suspended business operations because of Governor Andy Beshear’s Stay-at-Home Order. *Id.* ¶¶ 11, 13–14. The plaintiff submitted a claim under its policy for the losses, which Auto-Owners denied. *Id.* ¶¶ 15–16.

A floral and garden company sued Florists’ Mutual Insurance Company in Minnesota state court (Hennepin County) for breach of contract and declaratory relief. The company’s “all-risk” business interruption policy allegedly includes business income and extra expense coverage and does not include a virus exclusion. Complaint ¶¶ 4, 6, 10, 21. The plaintiff allegedly ceased its retail sales because of Governor Timothy Walz’s pandemic closure orders and COVID-19. *Id.* ¶¶ 16–17, 24. Because of the pandemic and the closure orders, the plaintiff lost business income and incurred extra expense, and so it submitted a claim to Florists’ Mutual, which was denied. *Id.* ¶¶ 18–20.

A complaint by a hair salon franchise suing West Bend Mutual Insurance Company for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief was filed and removed to federal court (E.D. Mo.). The salons’ “all-risk” commercial property insurance policies included business income, extended business income, extra expense, and civil authority coverage, as well as a virus exclusion. Complaint ¶¶ 1–2, 10, 50, 59, 65, 69, 75. After both the Missouri and Illinois state and local governments issued stay-at-home orders and because of the risk of COVID-19, the plaintiff closed its salons in both states. *Id.* ¶¶ 38–44, 46. The plaintiff submitted a claim under the policy, which West Bend denied. *Id.* ¶¶ 101–02.

Cincinnati and Restaurant Sue Each Other for Declaratory Relief

On December 7, 2020, the Cincinnati Insurance Company, Inc. sued a brewery and restaurant in federal court (D. Kan.) for a declaration that it need not cover the defendant’s alleged losses arising from COVID-19 under its commercial property policy. Cincinnati alleges that the defendant submitted a claim under the policy for business interruption associated with COVID-19, but that the policy does not cover the defendant’s losses because the state emergency proclamations do not cause direct physical loss or damage nor do they prevent access to the immediately surrounding area. Complaint ¶¶ 14, 30, 32, 36, 38. In addition, Cincinnati alleges that, even assuming the policy provided coverage, the policy’s pollution exclusion excludes the loss. *Id.* ¶ 39.

Three days later, on December 10, 2020, the restaurant sued Cincinnati in federal court (W.D. Mo.) for declaratory and injunctive relief, breach of contract, and vexatious refusal to pay. The “all-risk” policy allegedly provides business income,

extended business income, extra expense, civil authority, ingress and egress, dependent properties, and crisis event coverage. Complaint ¶¶ 13–28, 70. The restaurant alleges that the policy’s communicable disease exclusion applies only to the crisis event coverage endorsement. *Id.* ¶ 29. Further, the plaintiff alleges COVID-19 was present on its premises and physically altered it, leaving it unusable for its intended purpose. *Id.* ¶¶ 63–64. According to the plaintiff, the presence of COVID-19 caused the civil authorities to issue orders limiting and preventing ingress and egress to the property. *Id.* ¶ 66.

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